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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-1189

RONALD W. JOHNSON, TERRY EUGENE CUSHENBERY,
Petitioners,

vs.

JOHN W. WARNER, Secretary of the Navy, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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JOHN W. WARNER, Secretary of the Navy, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on November 27, 1972 and on December 4, 1972, reversing the judgment of the District Court which granted the Petitioners' Writs of Habeas Corpus. A Petition for Rehearing and a Suggestion for Rehearing en banc, in Johnson's cause was denied on January 12, 1973.

Opinions Below.

The opinions of the United States Court of Appeals reversing the judgments of the District Court are set out in the Appendix *infra*, pp. 1-8b. The order of the United States Court of Appeals denying the Petition for Rehearing and rejecting the Suggestion for Rehearing en banc, is set out in the Appendix, *infra*, p. 9. The

opinion of the District Court is set out in the Appendix, *infra*, pp. 10-17.

Jurisdiction.

This Court has jurisdiction under 28 U.S.C., §1254 (1).

Question Presented.

Whether regulations promulgated by the Secretaries of the Armed Forces have the effect of law when applied to enlistment agreements or contracts.

Statutes and Regulations Involved.

10 U.S.C. 5539 (1964) [superseded in 1968 by 10 U.S.C. 509] provided in pertinent part as follows:

> (a) Under regulations prescribed by the Secretary of the Navy with the approval of the President, a member of the regular Navy . . . may extend or reextend his enlistment by written agreement for less than one year or for a period of one, two, three or four full years.

Article C-1407 of the Bureau of Naval Personnel Manual (1967) provided in pertinent part as follows:

> (3) *Execution of Agreement to extend.*
>
> (a) *General.* In order to be considered legal and binding, pertinent portions of the Agreement to Extend Enlistment must be filed in . . . and signed by both the individual and the commissioned officer administering the oath on or prior to expiration of enlistment.

Title 10, U.S.C. §555 "b" provides as follows:

> Permanent appointments of regular chief warrant officers of the Navy . . . shall be made by com-

mission by the President, by and with the advice and consent of the Senate. Permanent appointments of regular warrant officers, W-1 regular warrant officers, shall be made by warrant by the Secretary concerned.

Title 10, U.S.C. §101(15), provides as follows:

"Commissioned Officer" includes a commissioned warrant officer.

Statement of the Case.

Petitioner Johnson originally enlisted in the Navy on September 22, 1967 for a period of four years. On October 16, 1967, Johnson agreed to extend his enlistment for an additional two years in order to obtain special training in the Nuclear Power Program.

This extension agreement was accepted for and on behalf of the United States by one Warrant Officer D. J. Stowe. Warrant Officer Stowe was not a commissioned officer, and was therefore not authorized to execute such agreements on behalf of the United States.

Pursuant to this extension, Johnson obtained special training in the Nuclear Power Program. He did not complete this program, due to medical problems, and was disenrolled from it on May 19, 1969. After exhaustion of his administrative remedies, to include an application to the Board for Correction of Naval Records, in an effort to cancel the extension agreement, Johnson filed suit in the District Court, Central District of California, following the expiration of his original four year enlistment, and obtained relief from the District Court in the form of granting his Petition for Writ of Habeas Corpus.

The District Court, Judge Albert Lee Stephens, found that the extension agreement was invalid pursuant to the Bureau of Naval Personnel Manual, Article C-1407 (3)(a), *supra.* Pursuant to this order, Johnson was released from the custody of the Respondents on January 19, 1972. On appeal by Respondents, the District Court's decision was reversed. [App. *infra,* pp. 1-8] Petition for Rehearing and Suggestion for Rehearing was denied, *infra* [App. *infra,* p. 9].

In *Kubitschek v. Chafee, et al.,* Civil No. 72-678-LTL (6/15/72) and *Cushenbery v. Warner, et al.,* Civil No. 72-1323-LTL (7/12/72) Judge Lawrence T. Lydick of the Central District, California, granted relief to Petitioners on the same issue; *i.e.* The invalidity of extension enlistment agreements accepted on behalf of the United States by Warrant Officer Stowe. The judgments in these cases are set out in the Appendix, *infra,* pp. 10-17. Based upon its decision as to Petitioner Johnson, the United States Court of Appeals for the Ninth Circuit also reversed Judge Lydick's decision in the *Kubitschek* and *Cushenbery* Petitions.

WHY THE WRIT SHOULD BE GRANTED.

1. The Court Below Misinterpreted the Holdings of This Court Regarding the Legal Efficacy of Naval Regulations.

Article I, §8, of the Constitution empowers Congress "To make Rules for the Government and Regulation of the land and naval forces". The Secretary of the Navy, appointed pursuant to 10 U.S.C. 5031, and exercising powers thereunder, has been granted power by the Congress to administer the Department of the Navy. 10 U.S.C. 6011. In a series of cases decided in 1887, *United States v. Symonds*, 120 U.S. 46; *United States v. Bishop*, 120 U.S. 51; *United States v. Philbrick*, 120 U.S. 52, this court held that regulations promulgated by the Secretary of the Navy have the effect of law so long as such regulations do not directly conflict with statute. *cf. Ex parte Reed*, 100 U.S. 13 (1879); *Cafeteria and Restaurant Workers Union, Local 473, et al. v. McElroy*, 367 U.S. 886 (1961). The Secretary of the Navy, similarly to the Secretary of Defense, has been held to act as the Constitutional organ of the President. *Hayden v. U.S.*, 38 Ct.Cl. 39 (1903); *Button v. U.S.*, 20 Ct.Cl. 423 (1885); *McElrath v. U.S.*, 12 Ct.Cl. 201 (1876) aff'd 102 U.S. 426.

This Court held, clearly and unequivocally, in *Cafeteria Workers*, that military regulations have the force of law upon those subject to such regulations. It is furthermore clear that this Court has held for about 100 years prior to the District Court's decision in favor of Petitioner Johnson, that Naval regulations, such as Article C-1407(3)(a), Bureau of Naval Personnel Manual, have the force and effect of law. The Respondents ad-

mitted both in the District Court and in the Court of Appeals that Article C-1407(3)(a) was in effect and is applicable to Petitioner Johnson's cause. There is, then, no issue as to the applicable regulation, but only as to the force and effect of the regulation and, possibly the interpretation of it.

The United States Court of Appeals for the Ninth Circuit relied upon this Court's holding in *Cafeteria Workers,* in deciding in favor of the Secretary of the Navy in *Rehart v. Clark,* 448 F.2d 1971. *Rehart* involved precisely the same federal contract as is involved in Petitioner Johnson's cause; *i.e.* An extension of enlistment agreement executed by an enlisted member of the United States Navy. In *Rehart,* the Secretary of the Navy argued that his regulations, even including a Bureau of Personnel Instruction, which is a directive of lower rank than the Bureau of Personnel Manual, had the force and effect of law. Furthermore, *Rehart* was exclusively the law relied upon by the District Court in granting the Petitions in the *Kubitschek* and *Cushenbery* cases, *supra.* And yet, in reversing the District Court's decision, the Court of Appeals for the Ninth Circuit, ignored its previous holding in *Rehart* completely.

In *Rehart,* furthermore, the Ninth Circuit Court of Appeals determined that the Navy's extension of enlistment contract was a federal contract governed by federal law. In its decision in Petitioner Johnson's cause, the Ninth Circuit used its equity power to specifically enforce a federal personal service contract. Historically, the usual remedy available for non-performance of a personal service contract is to recover in money damages for any unjust enrichment of the person or of the party failing to perform such contract.

Conclusion.

In that this matter involves the exceptionally important issues of the interpretation of federal contracts, the extent to which the government will be held to its own regulations regarding its contracts, and the extent to which members of the Armed Forces can rely on regulations affecting them, it is respectfully urged that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

DAVID REIN,
RICHARD P. FOX,
MAX GEST,
Attorneys for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Machinist's Mate Second Class Ronald W. Johnson, *Plaintiff-Appellee*, vs. John N. Chafee, Secretary of the Navy, et al., *Defendants-Appellants*. No. 72-1654.

[November 27, 1972].

Appeal from the United States District Court for the Central District of California.

Before: BARNES, MOORE* and ELY, Circuit Judges.

MOORE, Circuit Judge:

This is an appeal from a judgment and order of the United States District Court for the Central District of California granting the application of the appellee Johnson for a writ of habeas corpus requiring the Secretary of the Navy to cancel a two-year enlistment extension agreement and to discharge the appellee from the Navy.

On September 22, 1967, petitioner-appellee Johnson enlisted in the United States Navy for a term of four years. To obtain the advantages of special training in a Nuclear Field Program[1] being offered to enlisted men who agreed to extend the four-year term to six years,

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*The Honorable Leonard P. Moore, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

[1]Bureau of Naval Personnel Instruction ("BUPERSINST") No. 1306.64E, ¶ 4th (April 13, 1966) requires that personnel entering the nuclear field program agree to extend their enlistments so as to achieve a minimum six years active service commitment, measured from the date of enlistment. *See also* 32 C.F.R. 730.4 (e) (1).

Johnson on October 16, 1967, did "voluntarily agree to extend [his] my enlistment for a period of TWO years from the date of expiration thereof, subject to the provisions and obligations of [his] my said contract of enlistment of which this, [his] my voluntary agreement shall form a part." The agreement further stated that the Nuclear Field Program was the "REASON FOR EXTENSION" and that "I [Johnson] understand that this extension agreement becomes binding upon execution and may not be canceled except as set forth in BUPERS Manual, Article C1407." The extension agreement was signed by Johnson and sworn to before a Warrant Officer.[2]

Johnson commenced his special nuclear training on July 20, 1968, and completed the first twenty-four weeks of instruction, graduating satisfactorily on February 7, 1969. After completing nine additional weeks of advanced training, he was disenrolled by the Navy for medical reasons (poor hearing) and assigned to his pre-nuclear program duty as a machinist's mate.

In October, 1969, Johnson requested cancellation of his extension agreement, alleging that the agreement was null and void because it had not been sworn to before a *commissioned* officer, as required by Article C-1407(3) (a) of the Naval Personnel Manual.[3] John-

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[2]The administering officer, a "first-step warrant officer (W-1)", was not a commissioned officer and therefore was not authorized under statute or regulations to administer oaths in connection with enlistment agreements. The Navy has the statutory power to issue regulations authorizing Naval personnel other than commissioned officers to administer oaths, under 10 U.S.C. 936(b) (6), but it has not issued such regulations.

[3]Article C-1407(3) (a) of the Manual provided, in relevant part:

> *General.* In order to be considered legal and binding, pertinent portions of the Agreement to Extend Enlistment

son's request was denied. His four-year term of enlistment expired on September 21, 1971, and shortly thereafter he brought this action to obtain his release from the Navy.

The district court ordered the Navy to release Johnson, holding that in order for it to be considered "legal and binding" the extension agreement had to be signed by both the individual and the *commissioned* officer administering the oath[4] and that the Navy should be "bound by its own validly promulgated regulations." From the judgment ordering Johnson's release, the Secretary of the Navy appeals.

There is no question that Johnson voluntarily signed the extension agreement and that he understood and received (up to the time of his medical disenrollment) the benefits derived therefrom. The sole issue presented on appeal is whether, as Johnson contends, his signature and oath sworn to before a warrant officer instead of a commissioned officer prevented the agreement from becoming "legal and binding" *ab initio* and incapable of being ratified by his acceptance of the contractual benefits; or, as the Secretary contends, whether notarization of the agreement by a non-commissioned officer was merely a "formal defect" in the notarial authority of the witnessing officer which did not vitiate the legal effect of the agreement. Upon examination of the facts

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must be filled in as shown in Exhibit 1A-1 of Article B-2311 and signed by both the individual and the commissioned officer administering the oath on or prior to expiration of enlistment. . . . *Agreements entered into subsequent to the date of expiration of enlistment are without legal force and effect.* [emphasis in original.]

The present version of Article C-1407 is Article 1050150 of the Navy's Bureau of Personnel Manual (BUPERSMAN); the two are substantially similar.

[4] *See* note 3 *supra.*

here involved, we agree with the Secretary and therefore reverse the judgment of the district court.

We are mindful of the fact that, while courts are reluctant to interfere in military affairs, the Navy is bound by its own validly promulgated regulations and that district courts may properly entertain suits by servicemen requesting compliance with such rules. *See Nixon v. Secretary of the Navy,* 422 F.2d 934 (2d Cir. 1970); *Smith v. Resor,* 406 F.2d 141 (2d Cir. 1969); *Hammond v. Lenfest,* 398 F.2d 705 (2d Cir. 1968). Contrary to the opinion of the district court below, however, because Johnson had clearly manifested his voluntary written intent to be bound by the extension agreement, a mere formal defect therein, which in no way prejudiced him, does not present adequate grounds to cancel an otherwise valid agreement. Failure to swear to the execution of an extension form has been held not to affect the validity of the extension, *United States ex rel. Stone v. Robinson,* 431 F.2d 548 (3d Cir. 1970), wherein the court said at page 553:

> Certainly, any routine failure of appellant to swear to his execution of his extension form would not affect the validity of the enlistment extension, just as the violation of every regulation in some particular does not always invalidate the action taken thereunder. If the Regulation in this instance was not complied with in the respect indicated, appellant was not prejudiced in any way.

Here there was no lack of an oath but only a question of the status of the person administering it; obviously an *a fortiori* situation.

Far from being prejudiced from the fact that a non-commissioned officer accepted the contract terms on

behalf of the Navy, Johnson was the recipient of considerable benefits under the agreement: thirty-three weeks of special training which he would not otherwise have received. On its part, the Navy by enrolling Johnson in the nuclear field program, manifested its intent to be bound by the extension agreement, regardless of any flaw existing in the execution of the contract. Thus, even assuming for the moment that the notarial defect prevented the parties from being legally bound at the time of signing, their subsequent acts constituted a dual ratification of the contract terms. *See Clews v. Jamieson,* 182 U.S. 461, 483 (1901); Restatement (2d) Agency, §319 (1958).

The agreement in question, however, did not need ratification in order to bind the parties; it was valid from the moment Johnson signed his name to the agreement and swore to his loyalty oath before the warrant officer.[5] Even if Johnson had neglected entirely to take the oath, his signature would have sufficed to bind him. *See Nixon, supra,* at 938-40, and *Stone, supra,* at 552.

The extension agreement states that it "shall form a part" of the enlistment contract. By signing the ex-

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[5]The oath solemnly sworn to by Johnson was as follows:

> . . . I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the Regulations and the Uniform Code of Military Justice. So help me God.

We question the sincerity of the argument that this oath is devoid of meaning unless uttered in the presence of a commissioned, as opposed to a warrant, officer; and that a serviceman cannot be deemed to have meant it unless made before the proper Navy representative. We are reminded of the wisdom of the ancient Greek Aeschylus, who taught us that "It is not the oath that makes us believe the man, but the man the oath." [Aeschylus, *Fragment* 385.]

tension agreement Johnson agreed that the extension was ". . . subject to the provisions and obligations of said contract of enlistment." The contract of enlistment contains numerous provisions and obligations that continue in force by reason of the extension agreement, such as the obligations to discharge duties in conformance with lawful commands, to submit to disease-preventive measures, and to continue to uphold solemnly the oath taken upon enlistment.[6] According to Johnson's Enlistment Contract, he swore to the oath before a commissioned officer at the time of his enlistment. Since the oath was properly sworn to by Johnson at the time he entered into his enlistment contract, since it continued in force as a sworn provision and obligation of that contract by reason of his voluntary signing of the enlistment extension agreement, and since it was the same provision and obligation set forth in the extension agreement, the conclusion is inescapable that Johnson's swearing to the same provision and obligation again at the time he signed the extension contract was merely repetitive of an act which had already been performed. The requirement that the oath of allegiance be administered at the time of signing the extension agreement is merely a formality incident to the necessary act of signing; there is sufficient legal compliance with the provision if, as here, the oath was properly administered in the original enlistment contract. Johnson's signature on the extension agreement thus caused the terms of the extension to be incorporated into the

[6]*See* note 5 *supra.*

original contract of enlistment.[7] There is no question that Johnson's original enlistment agreement was "legal and binding" upon him; and it is uncontroverted that he voluntarily agreed to add two years to his original term of enlistment, in consideration of the Navy's providing him with advanced nuclear training. Having received a major portion of the training promised him, Johnson cannot now argue that it is inequitable to require him to fulfill his part of the bargain.[8]

Johnson's final claim is that even if the extension agreement is found to have been validly executed he is nonetheless entitled to cancellation of the agreement on the ground of impossibility of performance of the contract: he was prevented from completing the training program for medical reasons beyond his control. This argument too must fail. The Navy enrolled John-

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[7]The applicable statute relating to execution of Navy extension agreements at the time of the agreement here in question, 10 U.S.C. § 5539(a) (1964), required only that the extension be implemented by written agreement of the serviceman:

> (a) Under regulations prescribed by the Secretary of the Navy with the approval of the President, a member of the Regular Navy . . . may extend . . . his enlistment by written agreement for less than one year, or for a period of one, two, three, or four full years.

Section 5539(a) has been superseded by 10 U.S.C. § 509 (1970), which provides that ". . . Under such regulations as the Secretary concerned may prescribe, the term of enlistment of a member of an armed force may be extended . . . with his written consent for any period."

[8]BUPERSMAN Article 105300 and BUPERSMAN Article D-2305 provide appropriate relief for a serviceman forced to terminate special schooling by allowing him to reduce his extension to a period three times longer than the actual time spent in school. This reduction is still available to the appellee Johnson. Thus, with this reduction or proration, Johnson's extension commitment still outstanding will be twenty-three months rather than twenty-four months.

son in good faith and provided him with thirty-three weeks of special training until his illness disqualified him from further participation in the advanced segment of the program. The Navy stood willing and ready to perform its part of the agreement; it did not cause the appellee's illness nor his disenrollment. Although the illness prevented Johnson's further participation in *that program*, it did not, and does not now, render impossible his service of a prorated two-year extension commitment as a machinist's mate, in payment for the thirty-three weeks' training he did receive.

The district court judgment is reversed.

In the United States Court of Appeals, for the Ninth Circuit.

Filed: Dec. 4, 1972.

Dennis R. Mathews, Clerk, U. S. Court of Appeals.

Machinist's Mate Second Class Terry Eugene Cushenbery, Petitioner-Appellee, v. John W. Warner, Secretary of the Navy, et al., Respondents-Appellants. No. 72-2757.

An Appeal from the United States District Court for the Central District of California.

Before: BARNES and ELY, Circuit Judges.

PER CURIAM ORDER AND JUDGMENT:

This appeal raises the same issue as that involved in two recent decisions of this Court, namely *Johnson v. Chafee*, ... F.2d .... (9th Cir. No. 72-1654, filed November 27, 1972) and *Kubitschek v. Chafee*, ... F.2d .... (9th Cir. No. 72-2573, filed November 27, 1972). That issue was whether an enlisted man, whose voluntary written agreement to extend his enlistment was notarized and signed for the Navy by a non-commissioned warrant officer, is entitled to a judicial cancellation of the agreement (after receiving all or a portion of its benefits) on the ground it should have been notarized by a commissioned officer.

In each case the District Court had held he was; in *Johnson* and *Chafee*, this Court reversed, and held the enlisted man was not.

The motion made to this Court by counsel for appellant (without objection from appellee's counsel), to submit the matter on the record filed, without briefing or oral argument, was assigned by Chief Judge Cham-

bers to the above panel (consisting of two of the judges sitting on the panel hearing *Johnson, supra,* and *Kubitschek, supra*), for submission and decision.

This case is ordered submitted, and this Court concludes it must reverse the "decision and order" of the District Court, filed July 10, 1972, on the authority of *Johnson v. Chafee, supra,* and *Kubitschek v. Chafee, supra,* which here control.

In this case, the District Court conditioned its order releasing Cushenbery in a manner similar to the order entered in the District Court in *Kubitschek, supra.* For that reason, we follow the procedure adopted in *Kubitschek.* The judgment of the District Court is reversed, and it is directed that an appropriate judgment be issued by the District Court to incorporate the terms set forth in the District Court's said order filed July 10, 1972, and entered July 12, 1972.

/s/ Stanley N. Barnes,
STANLEY N. BARNES
/s/ Walter Ely,
WALTER ELY,
Circuit Judges

NOT PUBLISHED

APPENDIX B.

Order.

In the United States Court of Appeals, for the Ninth Circuit

John H. Chafee, Secretary of the Navy, et al., Respondent-Appellants, v. Ronald W. Johnson, Petitioner-Appellee. No. 72-1654.

Filed: Jan. 12, 1973.

Before: BARNES, MOORE*, and ELY, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc.

Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*The Honorable Leonard P. Moore, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

APPENDIX C.

Order Granting Petition for Writ of Habeas Corpus.

United States District Court, Central District of California.

Machinist's Mate Second Class Ronald W. Johnson, Petitioner, vs. John N. Chafee, etc., et al., Respondents. Civil No. 71-2328-ALS.

Filed: Jan. 5, 1972.

The instant petition was filed September 28, 1971. An Order to Show Cause was entered, 28 U.S.C. § 2243, and a Return filed. Machinist's Mate Second Class Johnson seeks release from the United States Navy contending that he is being illegally retained on active duty on the strength of an invalid enlistment extension.

Jurisdiction is proper under 28 U.S.C. § 2241.

Petitioner alleges and the Navy concedes that he has exhausted available military relief by petitioning the Bureau of Naval Personnel and the Board for Correction of Naval Records. Military relief was denied. *Noyd v. Bond,* 395 U.S. 683 (1969).

Respondents' Return admits most of petitioner's material factual allegations or alleges that they lack sufficient information to make an admission. No new factual allegation is made. No denial of fact is made other than to the allegation that petitioner extended his enlistment in order to become eligible to be a student in the Navy's Nuclear Power Program. However, the evidence submitted shows that the extension was made in order to become eligible for the school, and the court so finds. 28 U.S.C. § 2248.

No traverse was made to the return because it makes no allegations inconsistent with the application. The return stands as an affirmance of the factual allegations contained in the verified application, except as to those matters to which respondents lacked sufficient information on which to respond. The matter having been submitted on the pleadings and the certified Military Service Record, the court finds the facts alleged in the verified petition are true. 28 U.S.C. §2248.

The essential facts alleged and found are that petitioner enlisted in the Navy for a period of four years on September 22, 1967. On October, 1967, he extended his enlistment for two additional years so that he could participate in the Nuclear Power Training Program.

The oath for this extension was administered by Warrant Officer D. J. Stowe (W-1). Stowe was not a commissioned officer. 10 U.S.C. §§ 101(15), 555(b).

Petitioner reported to the Nuclear Power School on July 20, 1968, but on May 19, 1969, he was disenrolled for medical reasons. He had been there under instruction for 33 weeks. He is currently on duty as a Machinist's Mate and is not involved in the Nuclear Power Program. His original enlistment expired in September, 1971.

No hearing is required in the instant matter since there are no factual disputes and the application for the writ and the return present only issues of law. 28 U.S.C. § 2243. *E.g. Barker v. Ohio,* 330 F.2d 594 (6th Cir. 1964).

The legal issues presented for resolution on these facts are as follows:

Petitioner contends that the extension was a legal nullity because the oath was administered by a person not a commissioned officer and therefore not a person authorized to administer oaths.

Petitioner also contends that the Navy's denial of his application to set aside the extension violates his contractual rights arising from the extension agreement with the United States Navy in that he was precluded from completing the Nuclear Power Program for medical reasons and not by his own misconduct. He claims that he should be relieved of the additional burden of the extension under the theory of impossibility of performance of contract.

Respondents contend as follows:

1. There was no statutory or regulatory prohibition against a Warrant Officer (W-1) administering an extension oath. The Warrant Officer could have been authorized to administer oaths although in fact he was not so authorized. 5 U.S.C. § 2903(b)(2); 10 U.S.C. § 936(b)(6).

2. The provision requiring the presence of a commissioned officer is for the Navy's protection and Johnson was in no way prejudiced by the fact that a Warrant Officer accepted the extension agreement on behalf of the United States.

3. The extension agreement merely extends the "time" element of an already existing contract. Petitioner's original enlistment contract was sworn to before a commissioned officer. The oath sworn to at that time, which is the same oath contested here, continues in effect, it is argued, and is a mere repetition of an act which has already been performed. The requirement that this oath be administered at the time of signing

each extension agreement is simply a directory provision; there is sufficient legal compliance if the oath is properly taken at the time of original enlistment.

4. While the extension agreement recites that it was accepted on behalf of the United States by a warrant officer, and only a commissioned officer is authorized to do so, the agreement was subsequently ratified by the United States when it issued Johnson's orders to the Nuclear Power School, thus constituting a legally sufficient acceptance.

5. Petitioner has received a major portion of the nuclear training promised, and it is not inequitable to require him to pay back the Navy the educational benefit received. Bureau of Naval Personnel Manual [hereinafter BUPERSMAN, the abbreviation commonly used by the Navy] Art. 105300, and BUPERSMAN, Art. D-2305, provide relief for a serviceman forced to terminate special schooling by allowing him to reduce his extension to a period three times longer than the actual time spent in school. This reduction is still potentially available to Johnson. If Johnson applied for and received this reduction, his extension would be 23 months (instead of 24 months).

6. Finally, the Navy argues that Section 509 of Title 10, U.S.C., enacted January 2, 1968, Pub. L. 90-235 § 2(a)(1)(B), 81 Stat. 755, permitting the term of enlistment of an armed service member to be extended on his written consent (along), applies retroactively to Johnson.

The enlistment or extension oath may be taken before any commissioned officer of any armed force. 10 U.S.C. § 502. A commissioned officer includes a commissioned warrant officer. 10 U.S.C. § 101(15). Only

regular chief warrant officers of the Navy are commissioned. 10 U.S.C. § 555(b).

BUPERSMAN, Art. C-1407, Extensions of Enlistment, provides in part:

> "(1)(b) When the phrase 'Execution of the Agreement to Extend Enlistment' appears, this refers to the administering of the oath and signing of the authorized form by the member concerned and the witnessing of the signature by the appropriate commissioned officer. . . .
>
> "(3)(a) In order to be considered legal and binding, pertinent portions of the Agreement to Extend Enlistment must be filled in . . . and signed by both the individual and the commissioned officer administering the oath on or prior to expiration of enlistment . . . ."

Warrant Officer Stowe was not a chief warrant officer when the extension oath was administered. He was therefore not a commissioned officer.

Both the relevant statutes and the Naval regulations followed in Johnson's case require that the extension of enlistment procedure be conducted and witnessed by a commissioned officer in order to be considered, in the words of the regulation, legal and binding.

What it is true that non-commissioned officer Stowe could have been specially appointed to properly administer oaths, he was not.

The Navy is bound by its own validly promulgated regulations. See, *Service v. Dulles,* 354 U.S. 363, 372 (1957); *Accardi v. Shaughnessy,* 347 U.S. 260 (1954); *Federal v. Merrill, et al.,* 332 U.S. 380 (1947). The regulations were not followed in the

case of Johnson's enlistment extension. The enlistment extension procedure was therefore invalid and not legally binding on Johnson.

Unless the Navy is required to follow its own duly promulgated regulations as it is permitted to rely on them, the protection afforded servicemen would be rendered nugatory. The military is required to carry out those procedures and regulations it creates itself. See, *Smith v. Resor,* 406 F.2d 141 (2nd Cir. 1969), and cases cited therein at 145-147.

By his original act of enlistment, Johnson was obligated to fulfill four years of service in the Navy. He has fulfilled that obligation with distinction. See his Service Record Performance Charts. "Time" is the most substantive part of an extension agreement from the standpoint of both the serviceman and the Navy. His obligation expired under the original enlistment agreement after four years of service. The regulatory prerequisites and procedures complied with at the time of the original enlistment do not carry forward to the time of the extension. Rather, as outlined by the Naval regulations, the extension act and agreement are separate and distinct from the original enlistment requiring separate compliance.

Petitioner Johnson did not waive any rights he may have had by continuing in the Navy after the enlistment extension was signed. He was obligated to do so by the terms of his original enlistment. And he timely asserted that the extension was improper.

The impropriety lies in the Navy's failure to provide the proper officer. The Navy could not thereafter ratify the agreement as regards Johnson's rights by sending him to school. Having promulgated the regulations and

undertaken to carry them through, the Navy is bound by them. The Navy may be bound by adopting or affirming the warrant officer's acts, but such ratifications would thereby neither bind petitioner nor cause him to waive any rights he may have which arise from the improper extension. See generally, 3 Am.Jur. 2d, Agency, § 160. The fact remains that the enlistment extension was improper by reason of the status of Warrant Officer Stowe (W-1) and not by any fault of petitioner. See, *Norris v. Norman, et al.*, 296 F.Supp. 1270, 1276 (N.D. Ill. 1969).

Johnson was forced to terminate the special schooling because his hearing did not meet applicable standards. Until he receives a certification showing he has completed the program, he will not be able to reap in the Navy or in civilian life the benefits accorded those who successfully graduate and are certified. His present Naval assignment in an area unrelated to the Nuclear Program bear this out. The Navy is not being deprived of any special educational benefits taught Johnson in school.

The three-times-school reduction alternative which may be applied for, BUPERSMAN, Arts. D-2305, 105300, provides little consolation for Johnson. His possible reduction would amount to a maximum of one month.

Johnson is not claiming that he has not received "any benefit" from the school. See, *Nixon v. Secretary*, 422 F.2d 934 (2nd Cir. 1970). Rather, he correctly asserts that the enlistment extension itself was improper and not binding. And the Navy's argument that it would not be inequitable to require him to opt for the extension in light of the benefits received is therefore

not germane to determining whether the extension itself is binding.

Finally, 10 U.S.C. § 509 was enacted after Johnson signed the extension. The extension was not at that time made ". . . under such regulations as the Secretary concerned may prescribe . . .," *id.* An extension was attempted under BUPERSMAN, Art. C-1407, but it was improperly carried out. Section 509 has no retroactive effect nor is it applicable in this situation. See, *Stone v. Robinson,* 431 F.2d 548 (3rd Cir. 1970) for another way in which an extension can be validly made.

In summary, petitioner Johnson is entitled to relief.

IT IS HEREBY ORDERED that respondents forthwith release petitioner Johnson from that custody in which he is being held pursuant to the October 16, 1967 extension agreement.

IT IS FURTHER ORDERED that respondents' counsel of record advise the court and counsel for petitioner of compliance with this order by written notification or in open court not later than January 24, 1972, at 9:30 A.M., and the matter is set for receipt of such report then without further notice.

This is a final order and memorandum of decision entered in lieu of findings of fact and conclusions of law pursuant to Rule 52(a), Fed.R.Civ.P.

DATED: January 4, 1972.

/s/ ALBERT LEE STEPHENS, JR.
Albert Lee Stephens, Jr.
United States District Judge

APPENDIX D.

Memorandum of Decision and Order.

United States District Court, Central District of California.

Sonar Technician Surface Second Class John E. Kubitschek, Petitioner, v. John H. Chafee, Secretary of the Navy, Captain Donald Smith, Commanding Officer, Long Beach Naval Station, Captain William Spencer, Commanding Officer USS Long Beach, CGN-9, Respondents. No. 72-678-LTL.

Filed: June 15, 1972.

This matter is before the Court on the Petition for Writ of Habeas Corpus of John E. Kubitschek for release from custody of the Armed Forces.

Jurisdiction in this Court lies pursuant to 28 U.S.C. Section 2241. Respondents agree that available administrative remedies have been exhausted by the petitioner. Hearings before this Court were held on April 27, 1972 and June 9, 1972 at which oral and documentary evidence and stipulations were received and the matter thereafter submitted for decision.

On February 23, 1966, petitioner enlisted in the United States Navy for a period of four years. Thereafter, on March 12, 1968, petitioner executed an agreement to extend his enlistment for a period of two years in consideration, among other things, of his assignment to the Navy's Advanced Electronics Field Program.

He now seeks his release from the Navy on the ground that his extension agreement was not legal and binding because, first, at the time he executed that agreement his will and freedom of choice were overcome by threats made to him by his military superiors

and, second, the extension agreement was not signed by or the oath required in connection therewith administered by a commissioned officer as required by applicable Navy regulations.

At the time petitioner executed the extension agreement he was nearly twenty years of age, a high school graduate of above average intelligence with more than a year of college training and sufficiently outstanding and mature to be selected as the Master at Arms for his entire training company. His own testimony with respect to the alleged threats and overcoming of his will and freedom was vague, uncertain and inherently incredible. The evidence offered by respondents through those military superiors who dealt with petitioner at the times here involved is clear and unequivocal that no threats of any kind were made to him by them. On the evidence before it, the Court can only conclude that no threats were made to petitioner by his military superiors, that his will and freedom of choice were not overcome by such threats and that no duress of any kind occurred in connection with his execution of the extension agreement.

Applicable federal statutes and Navy regulations pursuant thereto in effect at the time the extension agreement was executed required that such agreements had to be signed by both the individual and ". . . the commissioned officer administering the oath . . ." in order for it to be considered legal and binding.[1] Warrant Officer D. J. Stowe, who signed the agreement and administered the oath on behalf of the Navy, was not such a commissioned officer. Respondents' various factual and legal arguments that the applicable Navy

[1]See 10 U.S.C. § 509; Bu.Pers. Manual, Ch. 1, ¶ C-1407(3).

regulations do not really mean what they say or for one reason or another are not binding upon the Navy are not supported by the evidence or legally persuasive.

The Navy is bound by its own validly promulgated regulations (*Rehart v. Clark*, 448 F.2d 170 [9th Cir. 1971]) and such regulations were not followed in the case of petitioner. As a result and by the specific terms of those regulations, the agreement was not valid and not legally binding on petitioner and petitioner is entitled to release.

IT IS HEREBY ORDERED that respondents forthwith release petitioner from that custody in which he is being held pursuant to the Agreement to Extend Enlistment dated March 12, 1968.

IT IS FURTHER ORDERED that if no appeal be taken from this Order within the time provided by law or if upon appeal this Order be affirmed, respondents shall accord to petitioner an appropriate discharge.

This is a final Order and Memorandum of Decision entered in lieu of findings of fact and conclusions of law pursuant to Rule 52(a), Federal Rules of Civil Procedure. The Clerk of this Court will serve copies hereof on counsel of record for all parties by United States Mail.

DATED: June 15, 1972.

/s/ LAWRENCE T. LYDICK
Lawrence T. Lydick
United States District Judge

APPENDIX E.

Memorandum of Decision and Order.

United States District Court, Central District of California.

Machinist's Mate Second Class Terry Eugene Cushenbery, Petitioner, v. John W. Warner, Secretary of the Navy; Captain Donald Smith, Commanding Officer, Long Beach Naval Station; Captain R. S. Smith, Commanding Officer USS Truxton (DLGN 35), Respondents. No. 72-1323-LTL.

Filed: July 10, 1972.

This Petition by Terry Eugene Cushenbery for Writ of Habeas Corpus is the third in a series of such petitions asking for the release from custody of the Armed Forces of personnel who challenge their agreements to extend their enlistments on the ground that their particular extension agreements are not signed by or the oath required in connection therewith administered by a commissioned officer as required by applicable Naval regulations.[1]

Jurisdiction in this Court lies pursuant to 28 U.S.C. Section 2241. Respondents agree that available administrative remedies have been exhausted by the petitioner. Hearings before this Court were held on July 5, 1972 at which evidence and stipulations were received and the matter thereafter submitted for decision.

It is our view that applicable federal statutes and Navy regulations pursuant thereto in effect at the time the extension agreement was executed by petitioner re-

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[1]See *Kubitschek v. Chafee*, U.S.D.C., C.D. of Calif., 72-678-LTL, and *Johnson v. Chafee*, U.S.D.C., C.D. of Calif., 71-2328-ALS.

quired that such agreement had to be signed by both the individual and ". . . the commissioned officer administering the oath . . ." in order for it to be considered legal and binding.[2] Warrant Officer D. J. Stowe, who signed the agreement and administered the oath on behalf of the Navy, was not such a commissioned officer. Respondents' various factual and legal arguments that the applicable Navy regulations do not really mean what they say or for one reason or another are not binding upon the Navy are not supported by the evidence or legally persuasive.

The Navy is bound by its own validly promulgated regulations (*Rehart v. Clark*, 448 F.2d 170 [9th Cir. 1971]) and such regulations were not followed in the case of petitioner. As a result and by the specific terms of those regulations, the agreement was not valid and not legally binding on petitioner and petitioner is entitled to release.

IT IS HEREBY ORDERED that respondents forthwith release petitioner from that custody in which he is being held pursuant to the Agreement to Extend Enlistment dated April 11, 1968.

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[2]See 10 U.S.C. § 509, Bu.Pers. Manual, Ch. 1, ¶ C-1407(3).

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1189

RONALD W. JOHNSON AND TERRY EUGENE CUSHENBERY, PETITIONERS

v.

JOHN W. WARNER, SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioners, Navy enlisted men, brought separate actions in the district court seeking writs of habeas corpus to test the legality of agreements they executed in 1967 and 1968 extending their service obligations for two years in return for their receiving advanced training in the nuclear field program.[1] The agreements were signed for the Navy by a noncommissioned warrant officer, who also notarized the petitioners' signatures and administered oaths of allegiance (Johnson Rec. 7, Cushenbery Rec. 6). At the time only commissioned officers were spec-

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[1]Military extension agreements are authorized under 10 U.S.C. 509, previously 10 U.S.C. (1964 ed.) 5539(a).

The relevant Bureau of Naval Personnel Instruction (No. 1306.64E) required that personnel entering the nuclear field program agree to extend their enlistments so that they would have a minimum of six years active obligated service from date of enlistment (Pet. App. 1, n. 1).

ifically authorized by statute and by Navy directives to sign such agreements and administer oaths (Pet. App. 2, n. 2). See generally 10 U.S.C. 502, 936(b)(6), 1031; Bureau of Naval Personnel Manual (BUPERSMAN) Arts. B-2305(4), C-1407(1)(b), C-1407(3)(a), now Arts. 5030230 (3)(a), 1050150(1)(b), 1050150(3)(a).

Petitioner Johnson received approximately 33 weeks of the one-year training program and was then disqualified for medical reasons (Pet. App. 11). Petitioner Cushenbery received the entire one-year training (Cushenbery Rec. 17). Petitioner Johnson is entitled under Navy directives to a pro-rated reduction of his extended service obligation as a result of his inability to complete the training program.[2]

After receiving the foregoing training and prior to the expiration of their original terms of service, both petitioners requested the Navy to cancel their extension agreements on the ground that, since the agreements had not been signed and sworn to before a commissioned officer, they were not legally binding (Johnson Rec. 2-3, Cushenbery Rec. 2). When the Navy refused to cancel the agreements, petitioners filed their actions for habeas corpus (Johnson Rec. 1-12, Cushenbery Rec. 1-7). The district court granted the writs on the ground that the Navy was bound by its own regulations (Pet. App. 10-17, 21-22).

The court of appeals reversed in *Johnson* (469 F. 2d 1216), agreeing with the Secretary that "notarization of the agreement by a noncommissioned officer was merely a 'formal defect' in the notarial authority of the witnessing officer which did not vitiate the legal effect of the

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[2]Pet. App. 7, n. 8. See BUPERSMAN Art. D-2305 (Johnson Rec. 34-35), now Art. 1050300 (Johnson Rec. 30-32). Cf. *Nixon* v. *Secretary of Navy*, 422 F. 2d 934, 940 (C.A. 2).

agreement" (Pet. App. 3). The court held that "because Johnson had clearly manifested his voluntary written intent to be bound by the extension agreement, a mere formal defect therein, which in no way prejudiced him, does not present adequate grounds to cancel an otherwise valid agreement" (Pet. App. 4). On December 4, 1972, the court of appeals reversed the district court in *Cushenbery* on the authority of *Johnson* (Pet. App. 8a-8b).[3]

The court of appeals' decision was correct. Petitioners suffered no prejudice from the "formal defect" which accompanied the extension of their enlistments, and received the benefits of the additional training in return for which they extended their service obligations. Cf. *United States ex rel. Stone* v. *Robinson*, 431 F. 2d 548, 553 (C.A. 3), where the court rejected a similar attempt by an airman to avoid the extension of his enlistment on the ground that he had not sworn to his extension application. Cf. also, *In re Grimley*, 137 U.S. 147, and *In re Morrissey*, 137 U.S. 157, where this Court rejected attempts by soldiers to avoid their enlistment contracts on the ground that at the time of enlistment they were

[3] The court of appeals also reversed the district court's similar decision in *Kubitschek* v. *Chafee*, No. 72-687—LTL (Pet. App. 18-20). See 469 F. 2d 1221.

not of the permissible age.[4] Moreover, the Navy ratified the action of the warrant officer by providing the petitioners with the training which it agreed to furnish them.

The court of appeals properly rejected petitioners' attempt on technical grounds to avoid the extension of their enlistment agreements which they voluntarily entered into in order to obtain additional training from the Navy. The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1973.

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[4]Petitioners' reliance on *Rehart* v. *Clark*, 448 F. 2d 170 (C.A. 9), is misplaced. There the plaintiff extended his enlistment in return for the Navy's undertaking to send him to certain schools. He contended that he was entitled to attend three schools. Navy regulations, however, permitted attendance at only one school. When the Navy refused to send him to the two additional schools, plaintiff sought to avoid the extension of his enlistment.

The district court refused to consider the Navy regulations in interpreting the contract. The court of appeals reversed and remanded the case for the district court to do so. *Rehart* thus involved only a question of contract interpretation. Moreover, under the Navy's interpretation of the contract, the plaintiff had not received the schooling for which he alleged he had extended his enlistment. In the present case, in contrast, the petitioners received what the Navy had undertaken to furnish them.